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In The
Supreme Court of the United States

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HSBC BANK USA, NATIONAL ASSOCIATION,
and CALIFORNIA STATEWIDE
COMMUNITIES DEVELOPMENT AUTHORITY,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err in creating an unprecedented new rule (contrary to the rules established by the Second, Third, Ninth, and Eleventh Circuits) that agreements will be enforced as leases in bankruptcy only when the rent "pays for new inputs," thereby relieving the respondent debtor airline from its obligation to pay rent for leased airport property under the Bankruptcy Code's plain requirement that a debtor perform "all the obligations" arising "under any unexpired lease of real property"?

2. Did the court of appeals err by refusing to apply the governing state law burden of proof and statute of limitations, in violation of this Court's holdings that "[p]roperty interests are created and defined [in bankruptcy] by state law" (*Butner v. United States*, 440 U.S. 48 (1979)), and burdens of proof and limitations statutes are substantive parts of any nonbankruptcy law that provides a rule of decision (*Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945))?

3. Should the court of appeals have adhered to the Eleventh Circuit's conclusion that "bankruptcy principles" should not be applied to relieve a debtor from paying rent under a government lease executed in a transaction that improves public property (like an airport), particularly where the court's unilateral recharacterization of the lease here puts at risk billions of dollars of airport bonds issued with similar lease revenue structures and jeopardizes this time-honored method of funding public accommodations?

**PARTIES TO THE PROCEEDING AND RULE 29.6
CORPORATE DISCLOSURE STATEMENT**

The Petitioners are HSBC Bank USA, National Association, and the California Statewide Communities Development Authority.

HSBC's direct and indirect parent corporations are: HSBC USA Inc.; HSBC North America Inc.; HSBC Investments (North America) Inc.; HSBC North America Holdings Inc.; HSBC Overseas Holdings (UK) Limited; and HSBC Holdings plc. No publicly held company owns ten percent or more of HSBC's stock.

The California Statewide Communities Development Authority is a governmental joint exercise of powers agency, formed under California law, whose constituent members include all 58 of California's counties, 324 of California's cities, and 63 special districts.

The Respondent is United Air Lines, Inc.

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CITATION OF OPINIONS AND ORDERS

The opinion of the court of appeals is reported at 416 F.3d 609 (7th Cir. 2005), and reproduced on pages 1 through 18 of the Appendix. The court of appeals' unpublished order denying rehearing and rehearing *en banc* is reproduced on page 75 of the Appendix.

The opinion of the district court, reversing the bankruptcy court's grant of summary judgment in favor of respondent United Air Lines, Inc. ("United"), is reported at 317 B.R. 335 (N.D. Ill. 2004), and reproduced (with the accompanying orders) on pages 19 through 37 of the Appendix. The bankruptcy court's opinion granting summary judgment to United is reported at 307 B.R. 618 (Bankr. N.D. Ill. 2004), and reproduced (with the accompanying order) on pages 38 through 74 of the Appendix.

JURISDICTION

The court of appeals' judgment was entered on July 26, 2005. The court's order denying rehearing and rehearing *en banc* was entered on August 23, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves interpretation of the phrase "unexpired lease of real property," which appears in but is not fully defined by section 365 of the Bankruptcy Code, 11 U.S.C. § 365, reproduced in relevant part on page 76 of the Appendix.

STATEMENT OF THE CASE

Background Facts. This case involves a maintenance facility at San Francisco International Airport. United leases the airport property from the City and County of San Francisco. United admits that it "does not own, will not own, and cannot ever own" the property. Statutes and regulations require that the airport remain at all times in public ownership and control.

In 1997, United subleased the maintenance facility to petitioner California Statewide Communities Development Authority (the "Authority") and then sub-subleased it back pursuant to an agreement entitled "Facilities Lease." At the same time, the Authority issued \$155 million in "lease revenue" bonds secured by the rent United was required to pay under the Facilities Lease. The bond proceeds then were used to make major renovations to the San Francisco airport terminal occupied (but not owned) by United.

This renovation of public property provided the basis for the Authority's involvement. The Authority is a government agency, known as a "joint exercise of powers agency," consisting of all 58 California counties, 324 California cities (including San Francisco), and 63 special districts. The Authority is authorized to issue bonds to finance the renovation of property owned by its members, but only when doing so "serves a public purpose and will promote the prosperity, health, safety, and welfare of the citizens of the State of California." Cal. Gov't Code § 91502.1(a). The Authority concluded (and no one has ever disputed) that the San Francisco airport projects met those criteria.

The Facilities Lease has all of the normal hallmarks of a "lease." It provides for United to occupy the leased

maintenance facility for a limited term of years in consideration for periodic payments of rent. It enables the Authority (or its assignee, petitioner HSBC Bank USA, indenture trustee for the bonds) to evict United and re-rent the property if United fails to make its rent payments, and it specifically references and incorporates provisions of the California Civil Code that delineate a landlord's rights and remedies upon a tenant default. See Cal. Civ. Code §§ 1951.2 and 1951.4.

The Authority's bonds were sold on the basis that the Facilities Lease was a lease, and investors purchased the bonds relying on the landlord remedies available to the Authority under that lease, including the right to evict and re-rent. After consummating the transaction, United acted as a tenant and accounted for its payments under the Facilities Lease as "lease obligations" (rather than as "long term debt") in its public financial statements and as "rental expenses" (rather than "interest expenses") in its tax returns. United has never claimed that its financial statements were misleading or that its tax returns were fraudulent.

United reversed field, however, when it filed for bankruptcy five years later. At that point, it stopped paying rent and, in a complaint filed with the bankruptcy court, asserted that the Facilities Lease is a "disguised financing" unregulated by the Bankruptcy Code's provisions regarding leases. Cf. 11 U.S.C. § 365(d)(3) (debtor required to perform "all the obligations" under a real property lease).¹ In the litigation, United submitted no

¹ All citations to the Bankruptcy Code are to the statutory provisions in effect at the time that United filed its bankruptcy case. The amendments to the Code through the Bankruptcy Abuse Prevention
(Continued on following page)

evidence other than the transaction documents. The petitioners, on the other hand, submitted unchallenged evidence establishing that San Francisco (rather than United) was the owner of the maintenance facility at all relevant times (both before and after expiration of the lease), that all parties had intended the agreement to be a lease, that the rent was objectively reasonable compensation for United's use and occupancy of the facility, and that the facility would have substantial value at the end of the lease term.

The Decisions of the Bankruptcy Court, District Court, and Seventh Circuit. The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157 and 1334. Disregarding the petitioners' evidence, the bankruptcy court granted summary judgment to United and declared that the Facilities Lease on its face "is not a lease for the purposes of assumption or rejection pursuant to § 365 of the [Bankruptcy] Code." App. at 74. The district court reversed, holding that United had not met its burden, under applicable California law, of overcoming the uncontested evidence that the parties intended the Facilities Lease to be a lease. App. at 28-32.

The court of appeals reversed yet again. The court agreed with the petitioners that, pursuant to *Butner v. United States*, 440 U.S. 48 (1979), state law governs the determination of whether the Facilities Lease is in fact a "lease." App. at 11. In so holding, the court endorsed the conclusion reached by the Third Circuit, most recently in:

and Consumer Protection Act of 2005, which generally became effective in October 2005, did not moot the issues raised in this case or prevent their recurrence in other cases.